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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1972

NO. 72-1530

R. P. DUGAS, *Petitioner*

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL, *Respondents*

REPLY TO PETITION FOR WRIT OF CERTIORARI

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To The Supreme Court of The United States:

Respondent, The Kansas City Southern Railway Company, respectfully prays that the Petition for Writ of Certiorari in this matter be in all things denied.

QUESTIONS PRESENTED

1. Whether the submission by the trial Court, in its charge to the jury, of "loss of enjoyment of life" as an element of damage separate from physical pain and mental anguish, and its further submission of "loss of vitality" as a separate element of damage

from loss of earning power and physical impairment constituted the submission of separate and additional elements of damage not authorized in FELA cases.

2. Whether the Court of Appeals correctly reversed the case because of the trial Court's error in submitting "loss of enjoyment of life" and "loss of vitality" as separate and independent elements of damage.

STATEMENT OF THE CASE

R. P. Dugas, the Plaintiff, was a common laborer for the Railroad whose average annual earnings for the four and one-half years preceding the accident were approximately $4,500.00. The Plaintiff's doctor testified that because of the accident he was fifty percent disabled. It was stipulated by the parties that at the time of the accident Dugas had a work-life expectancy of 20.21 years and an actual life expectancy of 27.65 years. Mr. Lonnie Hood, Jr. duly qualified as an actuary, testified at the time of trial that lost earnings of $2,500.00 over a 20.21 year work-life expectancy, discounted at five percent, would yield $31,342.50. Twenty-five hundred dollars per year lost earnings over the full 28-year life expectancy at the same discount rate would yield a recovery of $37,245.32. Further, Mr. Hood testified that a loss of earning capacity of $5,000.00 per year, over the full 28-year life expectancy of the plaintiff, discounted at the same rate, would have yielded a recovery of $74,490.65. Based upon these figures, it would appear that the jury's award of $200,000.00 constituted between $125,000.00 and $165,000.00 for subjective damages over and above past and future loss of earnings.

As is stated in the brief of Petitioner, the trial Court, in submitting its charge on damages, instructed the jury that they could award damages, on the one hand, for physical pain, mental anguish *and loss of enjoyment of life*, and on the other hand for loss of earning power, physical impairment *and loss of vitality*.

In essence, the Court of Appeals found that in tacking on *"and loss of enjoyment of life"* after physical pain and mental anguish, and in tacking on *"and loss of vitality"* after loss of earning power and physical impairment, the trial Court had actually submitted these two evidentiary *items* of damage—loss of enjoyment of life and loss of vitality—as totally separate and independent *elements* of damage for which additional sums could be awarded by the jury over and above what they might award for phsical pain and mental anguish on the one hand, and loss of earning power and physical impairment on the other hand. This, says the Court of Appeals, was improper, because these are merely includable items of damage under mental anguish and physical impairment and not separable.

Petitioner improperly states in his Statement of the Case that the Court of Appeals reversed the case simply because these elements might have been confusing. What the Court of Appeals says, at Page 14 of its Opinion, is that the quoted submission constituted an improper submission of additional elements of damage not authorized under the Federal Employers Liability Act, and ". . . *at the very least*, they were couched in terms that could have confused the jury as to the correct standards and had a duty to comply in this regard". (Emphasis supplied).

Respondent's objections to the charge, quoted at Page 5 of Petitioner's Petition, clearly, precisely and succinctly pointed out to the trial Court that this submission constituted the improper submission of separate elements of damage which were nothing more than evidentiary items includable under mental anguish and physical impairment.

ARGUMENT AND AUTHORITIES

Under its heading "REASONS FOR GRANTING THE WRIT" Petitioner makes the statement:

> "The Court of Appeals announced that it found no precedent for its holding."

Nowhere in its holding does the Court of Appeals say it has found no precedent. Quite to the contrary, the opinion below very carefully analyzes the case of *Chesapeake & Ohio Railroad Co. v. Carnahan,* 241 U.S. 241, 36 S.Ct. 594, 60 L.Ed. 979 (1916), in whch this Honorable Court set out the proper elements to be submitted in FELA cases for personal injuries. The rules set out in *Carnahan* have been followed by Federal Court without substantial deviation.

Further, the Court below, at Page 11 of the opinion, points out that in *Grunenthal v. Long Island R.R. Co.,* 388 F.2d 480 (2nd Cir. 1968) reversed on other grounds, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968), the Second Circuit held that the effect of an FELA employee's injuries upon the normal pursuits and pleasures of life (i.e. "loss of enjoyment of life") were *includable* elements of damage under pain and suffering and *not separable* elements of damage. The Court of Appeals does

say that it has found no case of similar import specifically on the subject of "loss of vitality", either for the submission of loss of vitality or otherwise.

Clearly under the holding of *Carnahan,* which has been consistently followed in FELA cases, submitting the two elements of damage here complained of as separate and distinct elements for which recovery could be separately given was erroneous. Petitioner tacitly admits this in attempting to distinguish *Carnahan,* and to show that the elements of damage submitted here have been approved in subsequent cases. Petitioner essentially relies on three authorities for this proposition, *Librecht v. Bethlehem Steel Corp.,* 402 F.2d 585 (2nd Cir. 1968), *Taylor v. Washington Terminal Co.,* 409 F.2d 145 (D.C. Ct. App. 1969) and *Sleeman v. Chesapeake & Ohio R.R. Co.,* 290 F. Supp. 817 (D.C. W.D. Mich. 1968) reversed, 414 F.2d 305 (6th Cir. 1969). Petitioner, at Page 10 of his Brief, says that these cases constitute "clear pronouncements" of the Courts of Appeals that the two elements of damage complained of here are properly submissible. Respondent pointed out in its Reply Brief in the Court of Appeals, and will here point out again, that these cases do not hold what Petitioner says they hold.

Librecht does not hold that the elements here complained of are proper *submissions* to the jury in FELA cases. By implication, it holds to the contrary. It does hold that *evidence* of loss of enjoyment of life and loss of vitality is proper evidence to be considered by the jury in determining the award to be given for pain and suffering, mental anguish and physical impairment. As was pointed out by the Court of Appeals, the *Grunenthal* case arrived at essentialy the same conclusion with regard to

loss of enjoyment of life. These are includable elements upon which evidence may be presented in determining pain and suffering and mental anguish and physical impairment, but they *are not* separate elements to be submitted separately.

In *Taylor,* the opinion of the Court of Appeals does not even set out what elements of damage were submitted to the jury. There was no question raised on appeal as to what elements of damage were submitted to the jury. The only question was whether or not remittiture which was ordered by the trial Court was proper. In reversing the trial Court and reinstating the judgment, the Court of Appeals merely made the offhand statement (409 F.2d 145, at P. 149) that:

> ". . . Projecting the pain and suffering, the anxiety and loss of enjoyment of life reasonably traceable to a stomach condition over Appellant's life expectancy, it would be difficult to conclude that an $80,000.00 award was not clearly within the range of reasonable jury verdicts."

This case does not hold that the elements of damage submitted here can be submitted in FELA cases.

Petitioner places great reliance on *Sleeman v. Chesapeake & Ohio R.R. Co.,* supra, claiming that the District Court opinion clearly authorizes the submission made in this case, and that the case was simply reversed on "other grounds".

First, *Sleeman* was a non-jury case tried to the Court and not to a jury. The question of proper elements of damage to submit to a jury could not arise in a non-jury case. Second, the trial Judge, in deciding the range of

damages, does make an offhand statement that things like loss of physical power and vitality and capacity to enjoy a normal life are to be *considered* in assessing damages. The case was reversed because of the failure of the Judge to apply a discount factor to the damages. In its opinion, the Court of Appeals literally blistered the trial Judge for not following ". . . the general principles of law as administered in the Federal Courts [in FELA cases] . . . (414 F.2d 305 at P. 307)".

Petitioner states three other separate grounds that he says constitute reasons for granting this Writ, and they will be here disposed of as succinctly as possible.

As his second "reason" Petitioner says that strictly construing the language of the charge the two phrases complained of were included in the elements to which they related—namely mental anguish and physical impairment. Had they been, Respondent would have no objection. They were not. They were tacked on at the end with the conjunction "and" which clearly indicated to the jury that they were additional elements for which separate recovery could be given and were not merely included in the elements to which they were tacked.

As a third reason, Petitioner says that in FELA cases all doubt should be resolved in favor of injured employees. This may be true, but the law must be followed. As the Court of Appeals below quite aptly stated at Page 14 of its opinion:

> "Defendant must pay damages, but it is entitled to have a jury measure those damages according to clear, legally correct, plainly enunciated standards,

an obligation which the trial Court no doubt intended but did not accomplish."

As its last point, Petitioner says that the holding of the Court below is in contravention of Rule 61 of the Federal Rules of Civil Procedure, the Harmless Error Rule. Suffice it to say that Rule 61 is discretionary, and the Court of Appeals did not consider the error here to be harmless. Considering the size of the verdict, and the portion of the verdict which must be attributed to the subjective elements of damage over and above actual loss of earnings, it was clearly not an abuse of discretion by the Court of Appeals to find that the error complained of did not fall within the purview of Rule 61.

CONCLUSION AND PRAYER

Petitioner understandably attempts to cast the opinion of the Court of Appeals below as being revolutionary and as deviating from accepted legal principles established for FELA cases. This just is not so. This case simply represents the all too often eincountered situation where one party to a lawsuit asks for and obtains from the trial Judge too much in the way of an advantage in the charge to the jury. The decision of the Court of Appeals does not, and cannot, work an injustice upon Mr. Dugas for the simple reason that it merely reverses the case to have another jury pass upon Mr. Dugas' damages under a charge on damages that is legally sustainable and fair and just to both parties.

It is respectfully prayed that this Honorable Court deny the Petitioner's Petition for Writ of Certiorari, and for such other orders as appear proper to the Court.

Respectfully submitted.

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Of Counsel:

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& GONSOULIN

CERTIFICATE OF SERVICE

A copy of the above and foregoing has been furnished to Kronzer, Abraham & Watkins, 500 Houston First Savings Building, Houston, Texas 77002, this _____ day of June, 1973.

BRYAN J. MCGINNIS